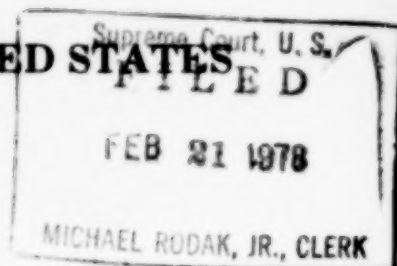


IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

* * *

No. 77-1033

* * *



**DOLPH BRISCOE, Governor of Texas
and STEVEN C. OAKS, Secretary of State
of the State of Texas**

Appellants

V.

**FRANK ESCALANTE, FRANK MOORE,
JOHN DILLARD, T. R. DILLARD, and
MARY DILLARD**

Appellees

* * *

**ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF TEXAS**

* * *

**OPPOSITION TO APPELLEES' MOTION TO
DISMISS AND APPELLEES' MOTION TO
AFFIRM**

* * *

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

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No. 77-1033

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DOLPH BRISCOE, Governor of Texas and STEVEN
C. OAKS, Secretary of State of the State of Texas,
Appellants

v.

FRANK ESCALANTE, FRANK MOORE, JOHN
DILLARD, T. R. DILLARD, and MARY DILLARD,
Appellees

* * *

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF TEXAS

* * *

OPPOSITION TO APPELLEES' MOTION TO
DISMISS AND APPELLEES' MOTION TO AFFIRM

Now come appellants Dolph Briscoe, Governor of Texas, and Steven C. Oaks, Secretary of State of Texas, defendants below, Appellants herein, and file their opposition to Appellees' motion that this appeal be dismissed and to Appellees' motion that the judgment of the court below be affirmed.

ARGUMENT AND AUTHORITIES

APPEAL WAS TIMELY DOCKETED

Appellees incorrectly cite November 20, 1977¹ as the date on which Appellants' notice of appeal was filed with the United States District Clerk of the Western District of Texas. As a result of their error, Appellees conclude that this appeal was untimely docketed because it was docketed on January 20, 1978. The notice of appeal was *mailed* on November 20, 1977, which was a Sunday. It was received by the District Clerk and filed on Monday, November 21, 1977. This fact is set out in the Jurisdictional Statement at page 2 and the notice of appeal, showing a filing on November 21, 1977, is included in the separately bound appendix at page 51. The United States District Clerk mailed a certified copy of the notice of appeal to the United States Supreme Court on November 22, 1977. That copy showed that the notice was filed on November 21, 1977. Appellants by cover letter with this Opposition have forwarded a second certified copy of the notice of appeal showing a filing date of November 21, 1977. This appeal was timely docketed.

¹Appellees correctly quote from Appellants' Application for Stay wherein it states that "Petitioners on November 20, 1977, filed their notice of appeal . . ." It was on Sunday, November 20, 1977, that Appellants' application for stay in the court below was denied allowing an application to be mailed to Mr. Justice Powell. Because it was Sunday, however, it was not possible to file the notice of appeal at that time, so it also was mailed. The District Clerk received it by mail the following day, November 21, 1977. A clerk from the United States Supreme Court called the attorney for Appellants during the week of November 21 -- November 25, 1977, to confirm that the notice of appeal had indeed been filed on November 21, 1977 instead of November 20, 1977 as indicated in the application.

THE DECISION OF THE MAJORITY OF THE COURT SHOULD BE REVERSED AND THE 1976 PLAN LEFT IN EFFECT

The election process in Tarrant County has proceeded on the basis of existent election precincts and single-member legislative lines as a result of the action of Mr. Justice Powell in granting Appellants' Motion for Stay on December 5, 1977, after referring the matter to the full Court. Tarrant County election officers mailed voter registration certificates on December 30, 1977 to approximately 342,575 voters. These voters were registered according to existent election precincts. The registration of voters according to the 70-100 new election precincts that would have had to be drawn to comply with the 1977 plan would have required an additional 2-3 months. An official list of registered voters is now being prepared for completion by March 1, 1978. A list of voting certificates cancelled by state law is being prepared as required by Article 5.14a of the Texas Election Code. By February 6, 1978, persons had filed for the primary election for state, legislative, county, district, precinct, and congressional offices. A total of 23 candidates filed for the nine state legislative seats in Tarrant County according to the single-member districts present in the 1976 reapportionment plan. The next election to be conducted on the basis of existent voting precincts will be a bond election of the Azle Independent School District on March 11, 1978. City and school elections will follow on April 1, 1978. Primary elections for state, legislative, county, district, congressional and precinct offices will take place on May 6, 1978. Run-off primaries will occur on June 3, 1978. The general election is November 7, 1978. All of these primary and general elections will take place according to existent voting precincts and existent legislative single-member district lines unless this

Court affirms the judgment of the District Court below.

Appellees ask this Court to act at this time to affirm the judgment of the district court below. Since Appellees do not make any legal argument or cite any case that they have not previously raised before this Court in their Opposition to Appellants' Motion for Stay, Appellants can see no reason to repeat the legal arguments set out in their Application for Stay and their Jurisdictional Statement. However, Appellants feel it appropriate to reply to Appellees' apparent effort to distract this Court from the true impact of the 1977 plan on the election process in Tarrant County.

Appellees seek to focus the attention of this Court on only a single aspect of their plan's impact--the plan's effect on existing city council districts in the City of Fort Worth. The City of Fort Worth is only indirectly affected by the proceedings in this case. It is Tarrant County, not the City of Fort Worth, that has responsibility for the conduct of state, legislative, district, county, precinct and congressional elections. The involvement of officials of the City of Fort Worth in proceedings below was motivated, as indicated in Appellees' Motion to Affirm, by their desire to protect the integrity of the city's newly established single-member city council districts. City officials were fearful that, since the city utilized state voting precincts, the redrawing of those precincts to comply with the 1977 legislative reapportionment plan would compel the City of Fort Worth to redraw its new city council lines. As indicated in Appellants' Supplement to their Application for Stay, officials from Tarrant County and the City of Fort Worth worked together, prior to this Court staying the lower court's order, to devise a scheme for redrawing state election precincts in such a manner that their impact on the city's single-member districts

would be minimized. Although it was not possible to develop a new set of election precincts that would permit the City's district lines to remain unchanged,² it was possible to devise a pattern of new precincts that would cause only approximately 3,000 persons to be moved from one city council district to another.³ This minimizing of the adverse impact on city council districts is an example of good faith and the cooperation of local officials. Such cooperation is to be commended, not attacked as a "repudiation" of testimony as urged by Appellees (Motion to Affirm at 12). Although the need for realigning city council districts can be minimized by the manner in which state voting precinct lines are redrawn, the need for altering some city council districts cannot be eliminated. (Motion to Affirm at 13; Motion to Affirm, Appendix A). More importantly, however, the overall impact of the 1977 plan on Tarrant County voters and the state election process remains essentially unaffected by the minimization of impact on Fort Worth city council district lines. For example, the number of state election precincts that must be redrawn⁴ and voters reregistered and separated from their present legislative representatives remains unchanged.

Appellees describe the state's argument concerning adverse impact on the election process as being one of

²Under state law, election precincts drawn by the county must conform to state, district, legislative and congressional district lines. Therefore it was not possible to redraw all affected precincts in such a way as to avoid the need for changing Fort Worth City Council lines. Tex. Elec.Code, art. 2.04.

³Appellants wish to emphasize that this figure represents the number of persons moved from one city council district to another. It is undisputed that at least 20,000 persons in the City of Fort Worth would be affected by the required redrawing of 14 precincts within the City. (Appellees' Motion to Affirm, Appendix A).

⁴It is uncontroverted that implementation of the 1977 plan would affect 70-100 voting precincts in Tarrant County.

"administrative inconvenience and expense" and then suggest that the greater weight of the evidence below is against such claims. Appellants' argument goes far beyond one of inconvenience or expense and is fully supported by all of the evidence below. Appellees' assertion to the contrary flies directly in the face of the conclusion of the majority of the court below who stated:

"Finally, we are urged, both as a matter of policy and equity, to consider that continued adherence to the present plan will have the effect of avoiding voter confusion and encouraging voter participation. Another change in the districting of Tarrant County, it is claimed, will work a disruption upon the election process, and will operate to the substantial inconvenience of those county officials responsible for implementing any electoral changes. *With all of these assertions we cannot disagree.* But we do not conclude that these arguments demonstrate the merits of one proposal over the other; they suggest, instead, the same pragmatic rational for decision that permitted only provisional relief once before." (Majority Opin., App. at 21-22)

As acknowledged above by the majority of the court and further emphasized in the Dissenting Opinion of Judge Wood, Appellees offered no evidence at the trial to contravene the evidence offered by the State of Texas that adoption of the 1977 plan would seriously disrupt the election process.

Appellees also mistakenly assert that Appellants' Jurisdictional Statement contains "no suggestion . . . that state policy or unique features necessitated the deviation contained in appellants' plan." Motion to Affirm at 12. Appellants set forth numerous state policies served by the 1976 plan that are not served in any way by the 1977 plan. See Jurisdictional Statement at 12-22. Among the many policies so served, perhaps

the ones constituting the most unique features of Appellants' plan are its retention of existent voting precincts and its avoidance of disruption of the election process. Appellees have never made an effort to understand the complexities of an election and to develop a plan that would avoid, or at least minimize, the adverse impact reapportionment can have on the election process and voters of Tarrant County. Instead, as explained by Appellees in their Motion to Affirm, they devised a plan in 1974 solely on the basis of 1970 census data and census tracts and made no effort at any time to modify their plan to take into consideration any legislative enactments or changing conditions in Tarrant County.

Finally, Appellants emphasize that action by this Court to affirm at this time the judgment of the court below would result in a shift between legislative districts in the middle of the election process and would not only create serious problems of voter and official confusion, but could impair the ability of the State of Texas to carry out its spring primary and general elections.

CONCLUSION

For the aforementioned reasons, Appellants pray that this Honorable Court deny Appellees' motion to dismiss this appeal and Appellees' motion to affirm the judgment of the court below. Furthermore, Appellants pray that this Honorable Court note probable jurisdiction of this case, reverse the decision of the majority below, and enter the 1976 plan as the permanent apportionment of state representative districts for former multi-member district 32, or, in the alternative, that this Honorable Court note probable jurisdiction of this case and set it for argument and plenary consideration.

Respectfully submitted,

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Attorneys for Appellants

CERTIFICATE OF SERVICE

I, Robert S. Bickerstaff, Jr., a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above mentioned cause on behalf of the Appellants. I do hereby certify that three copies of the foregoing Opposition to Appellees' Motion to Dismiss and Appellees' Motion to Affirm have been served by placing same in the United States Mail, First Class, Certified and Postage Prepaid, on this the _____ day of February, 1978, addressed to each of the following:

Mr. Don Gladden
Attorney at Law
702 Burk Burnett Building
Fort Worth, Texas 76102

Mr. David Richards
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Austin, Texas 78701

Mr. Joaquin Avila
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501 Petroleum Commerce Building

San Antonio, Texas

Robert S. Bickerstaff, Jr.